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IN THE

Supreme Court of the United States

October Term—1949

No. 691

WILLIAM M. BROWN,

Petitioner,

—v.—

KENNETH C. ROYALL, Secretary of the Army, and EDWARD F. WITSEL, the Adjutant General,

Respondents.

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In the light of certain statements contained in Respondent's brief and the seriousness of the problem presented, Petitioner deems it advisable and appropriate to file a Reply Brief. The questions which are raised by this appeal are set forth at length at pages 3 and 4 of our Petition.

Respondents do not dispute the facts as set forth in Petitioner's complaint, nor are any questions raised as to their accuracy and veracity. They are conceded by Respondent (Resp., pp. 4-6).

ARGUMENT

Erroneous Statement at Page 9 of Respondents' Brief.

Respondents charge that Petitioner "expressly disclaims any objection to the court-martial proceedings *per se*" (Resp., p. 9). However, respondents do not fully quote

the position which we take, namely, that for the PURPOSES OF THIS PETITION we do not attack the court-martial *per se*. The argument which is advanced by Respondents is taken out of context. It raises an unfair inference that we do not intend to question the court-martial proceedings. However, in the event our appeal is sustained, we shall show the impropriety of the court-martial proceedings because the manner in which the pretrial examination was conducted so distorted the proof of the facts involved as to render the trial a nullity.

Differences Between the* Humphrey *Case and the Case at Bar.

At page 10 of Respondents' brief the Government *admits* that there are factual differences between the case at bar and *Humphrey* v. *Smith*, 336 U. S. 695. The following table clearly reveals the differences between the two cases:

Humphrey Case	*Case at Bar*
1. Conviction for *rape* and *assault* with *intent* to rape.	1. Charged with appropriating and converting certain captured German Currency; illegal currency transactions; wrongfully warning a civilian to leave town to avoid arrest.
2. Investigation conducted.	2. Investigation improperly conducted.
3. Entire findings approved.	3. Only one finding approved.[1]

1 While the sentence was approved by the under-secretary, only one finding by the court-martial, that petitioner had unlawfully converted 30,000 Reichmarks, was approved (R., pp. 21-22).

Humphrey Case	*Case at Bar*
4. Accuser, impartial investigator and assistant trial judge advocate same person.	4. Defendant's counsel and investigating officer same person.
5. The irregularities of the pretrial investigation complained of did not affect the fairness of the trial.	5. The irregularities complained of rendered the trial a gross injustice.

We respectfully submit that there are sufficient facts to take the case at bar out of the holding of the *Humphrey* case. As stated in the *Humphrey* case, the all-important safeguards of Article 70 in the case at bar were not fully accomplished. But, despite Petitioner's protestations the reviewing authority did not consider this glaring violation of procedure. As a result of non-compliance Petitioner has been substantially injured. At page 697, this Court wrote as follows:[2]

> "We do not think that the pre-trial investigation procedure required by Article 70 can properly be construed as an indispensable prerequisite to exercise of Army general court-martial jurisdiction. The Article does serve important functions in the administration of court-martial procedures and does provide safeguards to an accused. *Its language is clearly such that a defendant could object to trial in the absence of the required investigation.* In that event the court-martial could itself postpone trial pending the inves-

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2 *Humphrey* v. *Smith*, 336 U. S. 695; also see Footnote 4 at p. 698.

tigation. *And the military reviewing authorities could consider the same contention reversing a court-martial conviction where failure to comply with Article 70 has substantially injured an accused.*" (Emphasis supplied.)

The Delay Before Trial and the Charge of Negligence in Not Preparing Petitioner's Case.

At page 11 of Respondents' brief, the Government attempts to excuse the long period of time which ran between the presentation of the first set of charges, dated June 29, 1945, and the second set of charges, *redrafted*[3] on September 8, 1945, culminating in the court-martial on February 18-19, 1946 (R., p. 18), by charging Petitioner with negligence in preparing his case for trial. Even had Petitioner known that the charges had been found sufficient to warrant court-martial he was not a free agent to go and do as he wished; he was an officer in the Army, limited and restricted by orders and regulations.

Despite various inquiries by Petitioner as shown by the court-martial Record, Command never advised Petitioner that the Major Taylor investigation had found the charges sufficient to warrant a court-martial until over eight months had passed. This great delay followed Major Taylor's investigation which had been conducted with such haste in view of the deactivation of the 8th Corps as to prevent the proper presentation of Petitioner's case.

The fact that the charges investigated by Major Taylor in June were changed and redrawn in September, without Petitioner's knowledge, and even though changed as Respondents' claim, in a minor manner, demonstrates Petitioner's uncertainty and the futility of his position.

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3 Respondents' brief, p. 6.

Petitioner could not, even had he been able, prepare his case for trial, since his unit was no longer in the area where the alleged violations were committed. Furthermore, command had issued orders proscribing the entry into this area by any United States personnel. Finally, the area had by that time been taken over by the Russian authorities, thereby preventing any person from crossing over into the Russian Zone of Occupation. Under the circumstances Petitioner could not prepare his case, examine witnesses or take any other pre-trial procedures so necessary for the proper presentation of his defense.

The Government took six months to prepare the charges and to interview its witnesses "on the ground" yet it placed Petitioner on terminal leave, and commissioned him a Lieutenant Colonel in the Reserves. *Suddenly, Petitioner was recalled to Germany, allowing him only five (5) days for preparation before trial.* Respondents thus denied him all means of obtaining witnesses.

It is our solemn conviction that Petitioner has been wrongfully convicted and has never had his day in Court. If this Court denies this Petition, then Petitioner must live the rest of his life under a cloud far darker than any prison sentence. Yet the fact that he is *not* in prison and himself cannot apply for a Writ of Habeas Corpus is the precise ground upon which the Lower Courts have denied him a hearing.

Here is the case of an American citizen, an Officer and a gentleman, holding the high rank of Lieutenant Colonel in the United States Army and a position of honor and distinction in civil life, while the country is at peace and while not in the "face of the enemy" being whisked out of his home and carried over-seas to be tried under the emergency conditions of a Field Court Martial on charges more than six months old.

The trial record received the perfunctory formality of a bureaucratic and administrative review and when appeal to the civil courts was attempted, Petitioner was defeated and denied the ordinary rights of a citizen by every legal technicality.

On the trial the Government totally failed to prove the amount of money involved. The Government charged grand larceny, *yet the jewelry, actually trinkets allegedly purchased with this money, was held by the Government for over a year and then returned to the Petitioner as having no connection with the case.* The Government used witnesses who would have no standing whatever in an American Court and who in no way connected Petitioner with the charges made. Yet, the appeal for review was denied on purely technical grounds. Petitioner has never had his day in Court.

The military establishment knew that, once the United States Army abandoned the area in favor of the Russian occupation forces it was a foregone conclusion that Petitioner could not obtain the information he required to prepare his case.

The very fact that Petitioner was returned to the United States for separation from service, and the very fact that Petitioner entered upon terminal leave definitely established in Petitioner's mind that the military establishment had abandoned his case. By such action Petitioner was lulled into a sense of false security through no fault of his own. Therefore, Petitioner thought it was no longer necessary to do anything further with the case.

The Wrongful Designation of the Investigating Officer.

The action which the military authorities took in appointing Major Taylor as investigating officer was improper and in violation of the canons of ethics governing

the conduct of attorneys. The Government brief does not explain the reason for this action, nor does it try to answer Petitioner's charges regarding the same. We submit that their action resembles in many respects the entrapment cases which are met in criminal cases. Had the military authorities proceeded in the usual manner, the information which the investigating officer had obtained could never have been used in obtaining a finding of guilty. It was through entrapment that the military authorities were able to accomplish that which they could not have done through the normal processes of investigation and preferring of charges and specifications. This Court has held that entrapment may not be employed for the purpose of obtaining a conviction.

Sorrells v. *United States,* 287 U. S. 435;
Butts v. *United States,* 273 Fed. 35.

We submit that the action taken with regard to the appointment of Major Taylor to the post of investigating officer was wholly improper. Such action was a violation of Petitioner's constitutional rights. The improper procedure substantially injured Petitioner, thereby laying the groundwork which ultimately resulted in a finding of guilty.

The equities are with the Petitioner. He should be given an opportunity to be heard. The finding of guilty in his case was in violation of substantial justice, Army Regulations, the Articles of War and all statutes applicable thereto, and finally the code of ethics governing the conduct of attorneys-at-law.

CONCLUSION

For the reasons set forth in Petitioner's Original and Reply Briefs, we sincerely urge that this Writ of Certiorari should issue.

Respectfully submitted,

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